IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: CHARLOTTE BLACKWELL AND D. MICHAEL FISHER,	:	
Petitioners	:	
	:	
v.	:	**No.**
	:	
LISA MICHELLE LAMBERT,	:	
Respondent	:	
	:	
THE HONORABLE STEWART DALZELL,	:	
Nominal Respondent	:	

PETITION FOR WRIT OF MANDAMUS

Petitioners, **CHARLOTTE BLACKWELL**, and **D. MICHAEL FISHER**, who are the named respondents in *Lambert v. Blackwell, et al.*, Civil Action No. 01-CV-2511, in the Eastern District of Pennsylvania, hereby respectfully move the Court pursuant to the All Writs Act, 28 U.S.C. § 1651 and F.R.A.P. 21, for a writ of mandamus directing the district court to recuse itself from any further participation in that matter.[1] As set forth more fully below, in an order filed on November 21, 2001,[2] the district court refused to take such action and the intervention of this Court is necessary.

I. Introduction

[1]For convenience, petitioners, who are, respectively, the superintendent of the New Jersey prison in which Lambert is serving her sentence, and the Attorney General of Pennsylvania, will be referred to in this petition as "the Commonwealth."

[2]Copies of the district court's memorandum and order appear in the Addendum to this petition. Other relevant record materials are contained in a separately-bound Appendix which is being filed with this petition. The appendix, which contains a table of contents, will be cited here as "App." Since many of the record documents relevant here were appended to the memorandum in support of the motion for recusal which was filed in the district court, we are including that motion and its supporting memorandum *in toto* in the appendix along with Lambert's response to the same.

The case with respect to which the Commonwealth now asks the Court to issue a writ of mandamus (No. 01-CV-2511 (E.D. Pa.), is action in *habeas corpus* brought by Pennsylvania prisoner, Lisa Michelle Lambert, pursuant to 28 U.S.C. § 2254. An earlier *habeas* case by the same prisoner was previously before the Court. *Lambert v. Blackwell*, 962 F.Supp 1521 (E.D. Pa. 1997), *vacated*, 134 F.3d 506 (3d Cir. 1997), *cert denied*, ___ U.S. ___, 121 S.Ct. 1353 (2001)(vacating district court's order granting *habeas* relief).[3] *See also Lambert v. Blackwell*, 116 F.3d 468 (3d Cir. 1997)(appeal of district court's denial of motion to stay petitioner's release); *Lambert v. Blackwell*, 164 F.3d 621 (3d Cir. 1998)(*en banc*)(vacating order of panel granting bail pending application for *certiorari*).[4]

On May 21, 2001, Lambert began this new *habeas* action, which was assigned to the same member of the district court who had handled her earlier action. (App. 1)(where the docket sheets for *Lambert II* are included). On June 14, 2001, the Commonwealth filed a motion pursuant to 28 U.S.C. § 455(a), for recusal of the assigned judge. (App. 4-212) In its motion, the Commonwealth maintained that because of what had transpired in connection with Lambert's prior attempt to secure *habeas* relief, reasonable persons would question the district court's impartiality in her new case and, therefore, the court should recuse itself. (*Ibid.*) The Commonwealth also asked the district judge to defer taking other action in this case pending a ruling on that motion to recuse. (App. 2) He declined to do so. (App. 3)

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[3]Lambert's previous case, which was docketed in the district court at No. 96-CV-6244, will be referred to here as *Lambert I*, and her case which is now in the district court as *Lambert II*.

[4]The decision of the Court of Common Pleas of Lancaster County which denied state post-conviction relief and was affirmed by Superior Court is not officially reported but may be found on WESTLAW at 1998 WL 558749 (Pa.C.P. Aug. 24, 1998).

On November 21, 2001, the district court issued an order which, *inter alia*, denied the Commonwealth's motion for recusal. *See* Addendum. The district court's ruling in this regard, which simply adopted its ruling on a motion for recusal filed in *Lambert I*, completely ignored the appropriate standard for determining if recusal is warranted, which this Court has repeatedly reiterated in its jurisprudence, whether, given all that has transpired, whether persons would question his impartiality.

The Commonwealth now files this petition for writ of mandamus seeking review of the district court's refusal to recuse itself in this action.[5]

II. Relevant Facts & Procedural History

1. Lambert began her previous *habeas* action, *Lambert I*, on September 12, 1996, with the filing of a *pro se* petition for such relief. (App. 33)(Petition, filed Sept. 12, 1996)(Record Document 1).[6]

2. The district court appointed counsel, who filed an amended petition on January 3, 1997, along with a motion to conduct discovery. (App. 3-34)(Record Documents 5 and 6). Three days later, before respondents[7] had made any response to the petition, the district court scheduled a status

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[5]The Court's jurisprudence indicates that this is the proper procedural path to follow, *see*, *e.g.*, *Antar v. Antar*, 71 F.3d 97 (3d Cir. 1995); *Alexander v. Primerica Holdings*, 10 F.3d 155 (3d Cir. 1993); *accord Madden v. Myers*, 102 F.3d 74, 78 (3d Cir. 1996).

[6]Copies of the docket sheets for *Lambert I* are included in the appendix at pages 33-48. As the appendix reflects, the docket sheets were one of the appendices to the motion for recusal filed in the district court. In citing to the same, we will identify the particular document(s) to which reference is being made. In this part, references are to the documents of record in *Lambert I*, unless otherwise specifically indicated.

[7]*Lambert I* involved the same respondents as *Lambert II.* Accordingly, for convenience, we will refer to them here as "the Commonwealth."

conference for January 15, 1997. (App. 34)(Record Documents 7 and 8). During that conference, without having received and reviewed a response to the petition, the district court granted Lambert's motion for discovery, and following the conference, issued an order to such effect. (App. 35)(Order of Jan. 16, 1997)(Record Document 15). In other orders issued the same day, the district court scheduled a second status conference for February 13, 1997, the day after the response to the petition was due, and again before any response to the petition had been filed or reviewed, the district court specially listed this case for a hearing to begin March 31, 1997. (App. 35)(Record Documents 14 and 16).[8]

3. During the January 15, 1997, conference, when counsel for the Commonwealth attempted to point out that decisions on discovery and whether a hearing will be held should be made upon a review of the pleadings filed by both parties, and after the issue of exhaustion was addressed, the district court cut her off mid-sentence, telling her she was "dead wrong," (App. 50-53)(Tr. 1/15/97 Status Conference), that in the "unusual circumstances . . . that exist here, I think that's simply wrong . . . ." (*Id.*)

4. The Commonwealth filed its answer to Lambert's amended petition on February 12, 1997, in which it formally and properly raised, as a defense, that Lambert, a state prisoner, had failed to exhaust her state remedies before commencing her *habeas* action as required by federal law, *see* 28 U.S.C. § 2254(b). (App. 35)(Answer to Petition at pp. 4-20)(Record Document 20).

[8]The district court's order was not formulated in contingent terms, *i.e.*, that a hearing would be held on the appointed date, in the event it were to be determined that such a proceeding would be required.

5. The day following the filing of the answer to the petition,[9] the district court convened the second status conference as previously scheduled, *see* ¶ 2, *supra*, at which time, the Commonwealth again raised the exhaustion issue, asserting that it was a threshold ruling the district court needed to make before proceeding any further. (App. 55-65) (Tr. 2/13/97 Status Conference) Once again, citing the "highly unusual circumstances" it considered to exist, the court did not proceed to rule on that procedural issue. (*Ibid.*)

6. Rather, it permitted Lambert to continue to conduct extensive discovery, including nearly 60 depositions, and appointed numerous experts at public expense, *see, e.g.,* (App. 36)(Order of Feb. 13, 1997)(Record Document 24)(provisionally approving compensation in excess of $1000 for each of several experts).

7. Beginning on March 31, 1997, the district court convened a hearing on the merits of some of the claims Lambert had raised, a proceeding which ultimately spanned three weeks. Prior to the completion of those proceedings, and before the Commonwealth had presented its case, it released Lambert to the custody of her attorneys. *See* (App. 40-41)(Order of April 16, 1997)(Record Document 68).[10]

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[9]The answer filed was voluminous, consisting of a pleading of 89 pages to which 674 pages of record material were attached as exhibits.

[10]As issued, the district court's order reflected that the Commonwealth had agreed that petitioner was entitled to immediate interim relief, and that was accurate at the time the order was entered. However, that concession was withdrawn the next day, (App. 77)(Tr. Of 4/17/97 at p. 2791), something to which this Court would point out in the ensuing appeal the district court had not given appropriate attention or effect. 134 F.3d 506, 511 n. 11.

At the time the Commonwealth withdrew its agreement, the District Attorney, who was then representing the respondents, moved for the district court's recusal, citing *inter alia*, the fact that the court had expressed the view very early in petitioner's case--beginning on the third day of testimony to be specific--that certain witnesses were committing perjury. *See* (App.77)(Tr. Of 4/17/97 at pp. 2789-2791). In denying that motion, the district court, which just the day before had praised the

8. The same day, again before the Commonwealth had an opportunity to present its case, the Court also entered an order barring the assistant district attorney from Lancaster County who had prosecuted Lambert's case, and seven police officers who had worked on it, from entering the federal courthouse. *See* (App. 41)(Order of April 16, 1997)(Record Document 70).

9. The first business day after the hearing had ended, the district court issued a ninety-page opinion, in which it condemned, in the strongest terms possible, Lambert's prosecution and conviction in the Lancaster County Court of Common Pleas, concluding that, in terms of prosecutorial misconduct, it had no peer in the annals of English-speaking jurisprudence. *See* 962 F. Supp. 1521, 1550 n. 42 (E.D. Pa. 1997).

10. The district court's opinion not just discredited--but repeatedly railed--at the testimony of police witnesses and the assistant district attorney who had prosecuted Lambert, at times calling what it heard from them "lies" and "perjury." *See, e.g.*:

- *id*. at 1541 ("[Det.] Barley committed perjury at Lisa Lambert's trial and [Officer] Reed almost certainly committed perjury before us and at his deposition");
- *id*. at n. 31 ("Barley's apparent perjury continued, in our view, in his testimony before us . . .");
- *id.* at 1542 ("[i]n some of his fantastic testimony before us, Chief Detective Solt claimed . . .");
- *id.* at n. 32 ("[t]here is a line in a witness's testimony between exaggeration and perjury. Chief County Detective Solt's testimony . . . seems to us to have gone well beyond that line . . .");

District Attorney for his candor and ethical behavior, said that it "had thought that [the District Attorney] and his colleague [*i.e*, his co-counsel in the *habeas* case] were in a different class than what we've heard before, and I regret to say that I have to reconsider that view." *See* (App.78)(Tr. of 4/17/97 at p. 2795).

- *id.* at 1546 (referring to "a moment of unguarded candor" on the part of a medical expert presented by the Commonwealth);

- *id.* at 1547 ("[n]othing can equal Mr. Kenneff's steadfast refusal to retract his lies to us about the use of 'pencil' on the '29' Questions, both under oath on the witness stand . . . and in his assertions . . . [in] Respondent's Answer");

- *id*. at 1549 (calling the assistant district attorney's testimony relative to a *Brady*[11] issue "a fantasy");

- *id.* at 1550-51 (where the court summarized what it said were "so many instances of grave prosecutorial [and other] misconduct");

- *id.* at 1548 ("[a]gain, Mr. Kenneff was indifferent to the law, because it impeded his conviction of Lisa Lambert").

11. The Court said that it had determined that there were

> at least twenty-five separate instances of such misconduct. In our view, a District Justice of the Commonwealth of Pennsylvania, former Detective Savage, may have committed perjury before us and obstructed justice in 1992. . . . Other witnesses in the state capital murder trial, including Chief County Detective Solt, Detective Barley, Lieutenant Renee Schuler, and Officers Weaver, Reed and Bowman, fabricated and destroyed crucial evidence and likely perjured themselves in the state proceeding. At least six seemed to perjure themselves before us. Agents of the Commonwealth intimidated witnesses both in the capital murder trial as well as in this habeas corpus proceeding. The prosecutor who tried the *Lambert* case and sought [her] execution knowingly used perjured testimony and presided over dozens of *Brady-Giglio*[12] violations, may have committed perjury, and unquestionably violated the Rules of Professional Conduct before our very eyes.

Id. at 1550. It went on to say that

> as to District Justice Savage and First Assistant District Attorney Kenneff, Chief County Detective Solt, Detective Barley, Lieutenant

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[11] *Brady v. Maryland*, 373 U.S. 83 (1963).

[12] *Giglio v. United States*, 405 U.S. 150 (1972).

> Schuler and Officers Weaver, Reed and Bowman, as well as the others in active connivance with them, we can only say that they should have known better than what they did--and tried to do--to Lisa Lambert.

Id. at 1553.

12. What's more, at its end, the opinion proceeded to take the greater Lancaster community to task saying that it had

> closed ranks behind the good family [of victim Laurie] Show and exacted revenge against this supposed villainess . . . In making a pact with this devil, Lancaster County made a Faustian Bargain [*sic*]. It lost its soul and it almost executed an innocent, abused woman. Its legal edifice now in ashes, we can only hope for a *Witness*-like barn-raising of the temple of justice.

Id. at 1555.

13. The district court did not simply reject the testimony of the assistant district attorney and police witnesses mentioned, *supra*, but it referred these individuals for investigation by the United States Attorney and/or judicial and attorney disciplinary authorities in Pennsylvania.[13] In its opinion, the court identified the various criminal charges which it believed the U.S. Attorney should investigate: "witness intimidation, apparent perjury by at least five witnesses in a federal proceeding, and possible violations of the federal criminal civil rights laws." *Id.* at 1550. Elsewhere, in its opinion, the district court mentioned "obstruction of justice," as well as the fabrication and/or

[13]Repeatedly, throughout its opinion, the district court referred to what it called the prosecutor's "blatantly unethical (and unconstitutional) actions," 962 F.Supp. at 1550, and said that there had been "indubitable violations of Fed.R.Civ.P. 11 and of the Rules of Professional Conduct . . . ." *Id.* at 1551. It wrote disparagingly of "the degree of Mr. Kenneff's bravado and incorrigibility on the issue of [certain of his ethical obligations] . . . was dramatically illustrated . . ." during testimony he gave at the *habeas* hearing. *Id.* at 1540. *See also id.* at 1547 n. 39 (where the Court lists various examples of the prosecutor's alleged indifference and/or "egregious misconduct" relative to his ethical obligations and refers to what it says was his "animus before us in pre-trial proceedings," which, it said, "suggest[ed] not only a lack of remorse but incorrigibility").

destruction of evidence. *Id.* at 1551.[14]

14. In equally emphatic terms, the district court credited the testimony of Lambert as exuding "punctilious honesty," *id.* at 1534, ultimately concluding that she was actually innocent of Laurie Show's murder, *id.* at 1528-1535, 1551, and that "virtually all of the evidence which the Commonwealth [had] used to convict [her] of first degree murder was either perjured, altered, or fabricated." *Id.* at 1550. "The fact is," it said, "the Commonwealth rigged the proceedings in the state trial to such an extent that it was a trial in name only." *Id.* at 1551.

15. Lambert was, in the district court's words, "first and foremost" of victims for whom "the long nightmare that began in her teens is ending," and commented that it would, "take much more than the granting of her petition to heal the wounds and banish the demons that have for so long hurt and haunted her." *Id.* of 1552.

16. In the appeal which followed from the district court's order granting Lambert relief in *habeas corpus*, this Court concluded that the district court had erred in entertaining her petition; that she was obliged to exhaust her state remedies prior to proceeding in federal court. *See* 134 F.3d 506 (1997).

17. The Court vacated the district's order and remanded with the direction that it dismiss Lambert's petition without prejudice. *Id.* at 525.

18. The district court eventually did this on February 3, 1998, (App. 46)(Order of Feb. 3, 1998)(Record Document 131), but not before requiring the parties to submit briefs addressing several

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[14]Contrary to the district court's impassioned assessment of their purportedly criminal and/or unethical misbehavior, those investigations did not reach the same conclusions. No charges, criminal, disciplinary, or otherwise, were ever initiated against any of the individuals castigated in the district court's opinion.

questions, including whether or not it was precluded, by this Court's ruling vacating its judgment and directing dismissal of the petition, from taking further action in the case. *See* Order of January 30, 1998 (Record Document 129).

19. Lambert filed a petition pursuant to the Pennsylvania Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 *et seq*. ("PCRA"), in state court on February 2, 1998, in connection with which a hearing was begun on April 30, 1998 in Lancaster County Court of Common Pleas. *See Commonwealth v. Lambert*, No. 423-1992 (Lanc. Co.).

20. She filed a motion in this Court asking for release on bail during the pendency of the petition for *certiorari* she had filed with the United States Supreme Court seeking review of the Court's ruling vacating the district court's order granting *habeas* relief.[15]

21. While the state court post-conviction proceedings, for which Lambert was present in Lancaster, PA, were ongoing, on May 6, 1998, a two-judge panel of this Court issued an order granting an application Lambert had filed with it seeking her release on bail during the pendency of petition for writ of *certiorari* she had filed in the United States Supreme Court. That order also provided that the matter was remanded to the district court for consideration of the terms and conditions of Lambert's release. *See* (App. 89-90)(where a copy of the order appears).

22. An hour after the issuance of the Court's order, without contacting the state court conducting the post-conviction proceedings, the district court faxed an order fixing a hearing on bail for May 8, 1998, and issued a writ directing the Commonwealth to deliver her immediately to the

[15]Lambert's petition was filed in the Supreme Court on April 28, 1998.

custody of the Court in Philadelphia. *See* (App. 91)(where a copy of that order appears).[16] Lambert was moved on May 7, 1998, in accordance with that order and a subsequent order of May 7, 1998, (App. 46)(Record Document 135), clarifying that Lambert was to be delivered to representatives of the U.S. Marshal's Office.[17]

23. Later on May 7, 1998, however, this Court stayed the May 6, 1998, order of the two-judge panel pending the filing of a petition for rehearing *en banc.* (App. 92) Though this order was personally delivered to the district court's chambers at once by this Court's staff and was reviewed, the district court nevertheless still required the parties to appear as scheduled the next morning.

24. This Court subsequently granted rehearing, vacated the panel order of May 6, 1998, which had granted Lambert bail, and denied her application. *See* (App. 93-95)(Orders of May 15, 1998 and August 3, 1998 (3d Cir.)).

25. On August 24, 1998, after eight weeks of testimony by nearly 100 witnesses and hundreds of exhibits, the state court denied Lambert's petition for post-conviction relief. In its 323-page opinion, claim after claim, it rejected Lambert's allegations on the merits in no uncertain terms, including claims that the district court had seen her way, pointing out in several instances, that when the district court had ruled in her favor it had less than the complete picture. *Commonwealth v. Lambert*, 1998 WL 558749 (Pa.C.P. Aug. 24, 1998).

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[16]As the documents in the appendix reflect, this Court's ruling was faxed at 16:59 hours on May 6, 1998; the district court's order setting a bail hearing for May 8, 1998--and ordering her immediate transfer "to the custody of the Court"--was faxed at 17:55 hours. (App. 89-91) It appears that this latter order is not docketed correctly in this case. Although it was issued and is dated May 6th, the docket reflects its issuance and entry on May 7th. *See* (App. 46)(Record Document 134).

[17]This, of course, served to bring the then-ongoing state court proceedings to a complete halt.

26. On September 21, 1998, Lambert appealed to the Superior Court of Pennsylvania.

27. On March 29, 1999, when she served her brief on the merits in that appeal, she also filed motion in the district court asking leave to file a second amended *habeas* petition. (Record Document 145). In her proposed new petition, Lambert asserted that she should be permitted to proceed in federal court based on the "futility" exception to the exhaustion requirement, *see* 28 U.S.C. § 2254 (b)(1)(B)(i), asserting that she could not get a fair hearing of her claims in the Commonwealth's courts, making exhaustion of state remedies a futile exercise.

28. The very next day, on March 30, 1999, the district court directed the Commonwealth to reply to what Lambert had filed by April 15, 1999. (Record Document 146). When they did, they pointed out, *inter alia*, that the court did not have any authority to entertain Lambert's request; put simply, given this Court's clear instruction to dismiss her petition, there was nothing to amend.[18] The district court took no action on Lambert's motion to file a second amended petition.

29. On December 18, 2000, the Superior Court of Pennsylvania ruled on Lambert's appeal from the denial of her application for PCRA, and affirmed the denial of the same. *Commonwealth v. Lambert*, 765 A.2d 306 (Pa. Super. 2000). Lambert took no steps to seek review of Superior Court's ruling by the Pennsylvania Supreme Court

30. On January 29, 2001, Lambert filed a request that the district court permit her to file a third amended *habeas* petition. (App. 47)(Record Document 154). Once again, the very next day,

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[18]The Commonwealth also maintained that given this Court's ruling that Lambert must exhaust state procedural options, which was now the law of the case, she could not initiate another premature action in *habeas*. In a supplemental filing, the Commonwealth likewise mentioned that, given the way in which Lambert had structured her new pleading, it appeared to be a second or successive petition which was subject to the "gatekeeper" provisions instituted by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), *see* 28 U.S.C. § 2244(b)(3)(A)-(E), which required her to apply successfully to this Court for leave to proceed before the district court entertain it.

the district court ordered the parties to submit their views as to whether this may be entertained and the parties did this on February 16, 2001. *See* (App. 47)(Record Document 155). As they previously had said in response to Lambert's request to file a second amended petition, respondents reiterated that there was no longer any petition to be amended since it had been dismissed with prejudice by the court on February 3, 1998, as directed by this Court. They also pointed out that, given the pendency of the petition for *certiorari,* the district court could not act on Lambert's motion.

31. On February 21, 2001, the district court issued a memorandum and order which indicated that it would defer any action on that request pending a ruling by the U.S. Supreme Court on the Lambert's petition for *certiorari*. *See* (App.97-104) (where a copy of that order appears).

32. On February 23, 2001, the Commonwealth moved for the Court's recusal in *Lambert I.* (App. 47)(Record Document 160)[19]

33. On March 19, 2001, the Supreme Court denied Lambert's petition for *certiorari*.

34. Notwithstanding the fact that *Lambert I* was conclusively ended by that action,[20] the district court, on April 20, 2001, proceeded to rule on the recusal motion, denying it. *See* (App.106-122) (where a copy of the district court's ruling appears).

35. On April 30, 2001, the Commonwealth filed a motion for reconsideration of the district court's order of April 20, 2001, in which they pointed out that, at the time the court acted on the

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[19]The Commonwealth's motion indicated (at p. 2 n.3 of the supporting memorandum filed with the motion) that it was being filed to put the issue before the district court when and if *Lambert I* returned to it. At the time the motion was filed, the petition for *certiorari* was still pending and, accordingly, there existed the possibility that *Lambert I* might return to the Court as the result of action by the Supreme Court on the same.

[20]Because the mandate had issued following this Court's *vacatur* of the district court's ruling granting relief, and had been acted on, there was no reason for the case to return to the district court following the denial of *certiorari*.

recusal motion, it had become moot since the denial of petition for *certiorari* had terminated *Lambert I.* (App. 48)(Record Document 164)

36. On May 11, 2001, the Court declined to vacate its ruling, eschewing "whatever technical merit [their motion] might have . . . ." *See* (App. 124-131)(where a copy of that order appears).

37. In the same order, the district court also directed Lambert to re-file her third amended petition as a new action by May 21, 2001, and directed the parties to submit memoranda in that new action addressing certain questions on or before July 16, 2001.[21] (App. 130-131)

38. Lambert re-filed what had been her proposed third amended petition in *Lambert I*, to begin *Lambert II* on May 21, 2001. (App. 2) Shortly thereafter, and before any action had been taken thereon, the Commonwealth moved on June 14, 2001, for the district court's recusal pursuant to 28 U.S.C. § 455(a). (*Id*.)

39. When the district court had not acted on the motion for recusal by July 9, 2001, the Commonwealth moved to defer the submission of memoranda pending a ruling on the recusal

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[21]The Court's order directed the parties to submit their views as to:

> (a) The effect of the Pennsylvania Supreme Court Order No. 218, Jud. Admin. Doc. No. 1 (May 9, 2000) on the exhaustion question;
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> (b) The effect of *Commonwealth v. Fahy*, 558 Pa. 313, 737 A.2d 214 (1999) upon the deference, if any, this Court must under the AEDPA accord the PCRA Court's findings and conclusions and the Superior Court's consideration of such findings and conclusion notwithstanding *Fahy*;
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> (c) The present effect, if any, of this Court's findings and conclusions in our April, 1997 adjudication, 962 F.Supp. 1521 (E.D. Pa. 1997); and
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> (d) Any other threshold matter either party deems relevant.

(App.130-131)

motion. (App. 2-3)(Record Document 5)

40. The district court denied that request on July 11, 2001. (App. 3)(Record Document 7)

41. The parties submitted their respective memoranda on July 16, 2001. (App. 3)(Record Documents 8 and 9) In its memorandum, the Commonwealth responded to the questions posed by the Court, and under the rubric of other significant matters raised two things: the untimeliness of Lambert's petition and the unacceptability of the document that purported to be her petition for writ of *habeas corpus*, a submission which did not even identify the crime of which she had been convicted.[22]

42. On November 21, 2001, the district court issued an order which, *inter alia*, denied the Commonwealth motion for recusal. (App. 3)(Record Document 12); *see also* Addendum.[23]

43. In a footnote in its accompanying memorandum, the district court briefly referred to the motion to recuse, saying it presented no material difference from the motion filed in *Lambert I* and that it was denying the motion for the same reasons. *See* Addendum (Mem. of Nov. 21, 2001 at p. 4 n. 3).

44. The Commonwealth now files this petition for writ of mandamus in this Court seeking review of that ruling. As set forth in more detail, *infra*, the district court completely ignored the proper legal principles which were to inform its decision on the motion to recuse and its decision

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[22]Along with its memorandum, the Commonwealth filed a motion to dismiss the petition, or in the alternative, to strike the petition. (App.3)(Record Document 9)

[23]The district court's order also denied the Commonwealth's motion to dismiss the petition, on the ground that it was untimely, and its alternative motion to strike the petition, for failing to properly set forth any claim for which *habeas* relief could be granted. *See* Addendum.

constitutes an abuse of discretion.[24] This court should, therefore, issue a writ of mandamus directing the district judge to recuse himself in Lambert's pending *habeas* action.

III. This Court Should Issue A Writ of Mandamus Directing That The District Court Recuse Itself Because What Has Transpired In Prior Litigation Involving This Petitioner Unquestionably Serves to Raise Serious Questions In Reasonable Minds About The Impartiality Of The Adjudication of The Claims In This Matter.

"The right to trial by an impartial judge 'is a basic requirement of due process.' " *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir. 1992)(quoting *In Re Murchison*, 349 U.S. 133, 136 (1955)).

> Impartiality and the appearance of impartiality in a judicial officer are the *sine qua non* of the American legal system. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 . . . (1968), the United States Supreme Court stated: [A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even *the appearance* of bias. 671 F.2d at 789.

Haines, 975 F.2d at 98 (quoting *Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982))(citations in original; emphasis added).

Whether a jurist is actually "incapable of discharging judicial duties free from bias or prejudice . . . is not the test." *Haines, supra*, 975 F.2d at 98. "[R]ather, the polestar is '[i]mpartiality and the appearance of impartiality.' " *Ibid.* (quoting *Lewis, supra*, 671 F.2d at 789). That the public perceive the judicial process as fair and impartial is of paramount importance. *See, e.g., Liteky v. United States*, 510 U.S. 540, 554 (1994); *Primerica, supra,* 10 F.3d at 167; *Haines*, 975 F.2d at 98. *Accord Antar v. Antar*, *supra*, 71 F.3d at 101. Therefore a court must "preserve not only the reality

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[24]The standard of review which applies in connection with a petition for writ of mandamus seeking review of a recusal ruling is whether there was an abuse of discretion by the district court. *United States v. Antar*, 53 F.3d 568, 573 (3d Cir. 1995).

but also the appearance of the proper functioning of the judiciary as a neutral, impartial administrator of justice." *United States v. Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989)(quoted in *Primerica, supra*, 10 F.3d at 167, and *Haines, supra*, 975 F.2d at 98). "When the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced." *Primerica, supra*, 10 F.3d at 166.

While the conduct with respect to which a request for judicial disqualification is being sought typically "must involve an extrajudicial factor," *U.S. v. Antar, supra*, 53 F.3d at 574 (citing *Liteky, supra*), both this Court and the United States Supreme Court, have also recognized, this is not an absolute rule; there are circumstances when "opinions formed during a judicial proceeding may in certain instances give rise to a duty to recuse." *Ibid.* (quoting *United States v. Bertoli*, 40 F.3d 1384, 1412 (3d Cir. 1994). *Accord Liteky*, 510 U.S. at 550 (where the court cited as an example a situation where, in the course of a trial, a judge acquires a hatred for one of the parties); *Primerica, supra* (where the events which compelled recusal were part of the case). In such instances, for case-based conduct to be seen to evince improper bias or prejudice, "the court's actions 'must reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.' " *U.S. v. Antar, supra*, 53 F.3d at 574 (quoting *Liteky*, 510 U.S. at 555).

In determining if this line has been crossed, the question is not whether the jurist is actually laboring under a bias or prejudice for or against a party, *see Bertoli, supra*, 40 F.3d at 1412, but rather, "if a reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality . . . ." *U.S. v. Antar*, 53 F.3d at 574 (quoting *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980))(other citations omitted). *Accord Primerica, supra*, 10 F.3d at 164 (" . . . the appropriate--and the only--inquiry . . . is 'whether

a reasonable person, knowing all the acknowledged circumstances, might question the district court judge's continued impartiality")(quoting *In Re School Asbestos Litigation*, 977 F.2d 764, 781 (3d Cir. 1992)). "Congress enacted [28 U.S.C. §] 455(a) precisely because 'people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.' " *In Re School Asbestos Litigation*, 977 F.2d at 782 (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864-65 (1988)).

The district court has never taken notice of, let alone been guided by these principles. As its opinion in *Lambert I*, which it adopted in this case, reflects, the only question it appears to have considered was whether it could be impartial. (App. 109-121) That, however, was not the proper question, as the decisional law discussed, *supra*, underscores. The district court was obliged to consider whether a reasonable person might question its impartiality. In failing to take the proper measure of the issue, the district court's ruling constituted an abuse of discretion. Simply put, it did not identify or employ the correct legal principles and its ruling was therefore seriously flawed. When governing law is actually given full effect and application, it compels a very different result.

We submit that any reasonable person, aware of all that has occurred in the course of the prior litigation involving this *habeas* petitioner, could not help but harbor doubts--and serious doubts at that--about the district court's impartiality in this new action. Indeed, rare would be the person who would *not* question the district court's ability to be impartial in light of what it has previously said and done. Precisely the same problem that warranted reassignment of the trial judge in *Primerica, supra*, is present here, *i.e.*, "that the outcome of this case 'would be shrouded [in] suspicion' if [the assigned judge] were to continue to preside as trier of fact," 10 F.3d at 163 (quoting *In Re School Asbestos Litigation, supra*, 977 F.2d at 785), and there is even more reason

than there was in that case to believe that reasonable persons would question the Court's impartiality.

For the record in *Lambert I* shows that, from the earliest moments of that case, the district court departed from procedural norms in *habeas* cases, granting discovery and setting a hearing date, things which favored the petitioner, without even waiting to receive the Commonwealth's answer to the petition, something the procedural rules instruct it to do. *See* Rule 8(a)(for Section 2254 cases). The court's treatment of the matter, as extraordinary, and thus warranting deviation from well-settled exhaustion rules, from the start--before even considering the contents of a responsive pleading-- would be troubling to a reasonable observer. Surely, this could be seen to raise questions of prejudgment notwithstanding any of the court's disclaimers about having not made up its mind about anything. Its actions, to a reasonable observer, might fairly be seen to tell a different story. At the time the district court permitted petitioner to embark on her wide-ranging and expensive discovery campaign, and at the time it set a not too distant hearing date, the only things before the court were the *allegations* being made by *one* side in this litigation.[25] It had not even afforded the Commonwealth the most basic of due process rights, *i.e.*, the opportunity to respond to the many averments contained in the petition and to present its views about the viability of the merits of the claims in it before it made these critical rulings which imposed such great obligations. A reasonable person might take from the undue speed with which the district court acted in this regard that the court simply wasn't interested in what the Commonwealth had to say and that whatever it said would

[25]From January 8, 1997, a few days after the first amended complaint had been filed, until February 7, 1997, the Court received a series of correspondence, either directly or as the result of being copied, which echoed the allegations in that petition, *i.e.*, that Lambert was innocent, that prosecutors were withholding important information/evidence, *etc*. *See* (App. 133-154)(which contains copies of the correspondence). A reasonable person might see these communications as having affected the court's perception of this case and contributing to its vehemently negative views of the Commonwealth's witnesses and evidence.

be of absolutely no import; that the district court had *already* accepted, as true, at least some of what was being alleged by petitioner.

But even if that were not the case, the hyperbole with which this Court repeatedly infused its decision in the matter--calling it a case of injustice without peer in the English-speaking world, for example--more than suffices to raise questions about the Court's ability to see things any other way. The vehemence of its ruling on the merits undoubtedly would make it very difficult for any reasonable person to believe that the district court can start with a clean slate in considering the Commonwealth's position in this litigation.[26] What reasonable person would have confidence that, given the district court's prior, emphatic view of the facts and claims--a view which discredited many of the Commonwealth's witnesses so completely and embraced petitioner's contentions so wholeheartedly--the Commonwealth could, let alone would, now receive a fair hearing in this case which covers so much of the same ground? After all, as detailed, *supra*, the district court repeatedly called many of the witnesses whose testimony figures critically in the Commonwealth's defense of this action liars, perjurers and conspirators and even went so far as to refer them for prosecution as criminals and/or for professional discipline.[27] In light of this, reasonable persons could believe that

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[26]*Lambert II* must be treated as a completely new matter. *See Jones v. Morton,* 195 F.3d 153, 160(3d Cir. 1999)(" '[t]ypically, when a complaint (or *habeas* petition) is dismissed without prejudice, that complaint is treated as if it never existed' ")(quoting *Hull v. Kyler*, 190 F.3d 88, 103-04 (3d Cir. 1999). Accordingly, " a subsequent petition filed after exhaustion is completed cannot be considered an amendment to the prior petition, but must be considered a new action." *Id.* at 161. In such circumstances, a petitioner proceeds "as if it were the first such filing." *Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997). *See also Slack v. McDaniel*, 529 U.S. 473 (2000)(holding that "[a] *habeas* petition filed in the district court after an initial *habeas* petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition").

[27]In some instances, the district court did this--or took other action of an adverse nature against respondents' witnesses *before* the testimony in the case was completed; indeed, before the testimony in *petitioner's* case was completed. *See* (App. 69-70)(Tr. 4/2/97 at pp. 633-637)(where

the district court is possessed of very firmly-held opinions about the credibility--or lack thereof--of witnesses and evidence which figure importantly in the Commonwealth's defense of this case. We submit that reasonable persons would question whether these individuals--previously seen by the district court as parties to "a Faustian [b]argain," 962 F.Supp. at 1555--could now be viewed as anything else.

Similarly, given the court's strongly expressed convictions concerning Lambert's innocence and her victimization, it would be exceedingly difficult to convince any reasonable person that the district court could not now be affected by these things. After the court's having seen Lambert as the victim of the greatest injustice in the annals of English-speaking jurisprudence; after it has allowed that it will "take much more than the granting of her petition to heal the wounds and banish the demons that have for so long hurt and haunted her," 962 F. Supp. At 1552; after it has so dramatically exonerated her saying it "was as though [she was] delivered from Central Casting for the part of villainess," *id.* at 1555, what reasonable person would not have questions or be skeptical about the district court's ability to be impartial in this new case in which she makes the same claims?

Because, as a *habeas* case, this is a non-jury proceeding, and the judge is therefore tasked with deciding both legal and factual issues, the importance of ensuring that the public's perception of judicial integrity is increased. As *Primerica* points out, *see* 10 F.3d at 163, in situations where

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just three days into the hearing the district court expressed the view that it was hearing perjured testimony); (App. 73-75)(Tr. 4/16/97 at pp. 2704-2710)(where the court directed counsel for respondents to report the Pennsylvania District Justice who was testifying to state judicial disciplinary authorities); and (App. 41)(Order of Apr. 16, 1997)(Record Document 70)(barring eight individuals from courthouse)). In *Primerica*, this Court said that reasonable persons might question the impartiality of a judge who, before all the evidence was received in a case, had expressed the view that certain witnesses may have committed perjury and should be referred for possible investigation by a grand jury. 10 F.3d at 164.

the record reflects events or occurrences which might generate doubts about the impartiality of the sole arbiter of a dispute, it can be particularly difficult "to defuse, quiet or overcome" suspicions of the public and others relative to the court's rulings. *Id.* This consideration, too, bespeaks the need for recusal in this case.

What reasonable person would believe that the court would not be influenced by its prior evaluation of the evidence and witnesses when making rulings in this case, not just on substantive questions, but also when it comes to important threshold procedural issues, such as whether Lambert has made an adequate showing of "actual innocence" so as to be able to overcome procedural default. *See generally Wainwright v. Sykes*, 433 U.S. 72 , 87 (1977); *Schlup v. Delo*, 513 U.S. 298 (1995). Even if the court were capable of divorcing itself from its strongly-voiced conclusions and could render rulings free from the influence of its prior assessment-- something about which we express no view as the court's ability to do this since it is not part of the calculus, *see Bertoli, supra*-- any rulings made by the court which favored Lambert would nevertheless be "shrouded in suspicion" in reasonable minds given its prior determinations. Given the district court's past, vehement proclamation that Lambert was actually innocent of the crime of which she was convicted, what reasonable person could not help but have grave doubts about the court's impartiality concerning any ruling in this case that she had made an adequate showing of "actual innocence" so as to avoid procedural default? Accordingly, the Court should, in the interest of ensuring public confidence in the outcome of this litigation, require the district judge to desist from participating.[28]

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[28]Given the procedural developments in *Lambert II*, and the district court's decision to rule on the motion for recusal at the same time it addressed matters discussed in the memoranda filed on July 16, 2001 by the parties, the district court has in fact said that Lambert's claims are not procedurally defaulted; that, based on its findings of fact in *Lambert I*, which it re-adopted in *Lambert II*, she has established a "fundamental miscarriage of justice," and, accordingly, has

Also, given the repeated rejection of the district court's prior appraisal of Lambert's claims by the state courts, and the various investigatory bodies to whom such referral for prosecution or professional discipline was made, what reasonable person would not wonder if any continued participation by the same jurist might be influenced by concerns other than the evidence? Reasonable persons, we believe, might question if the court was motivated by a desire to correct perceived "errors" by those bodies.

Certainly, the memorandum the district court issued on February 21, 2001, in *Lambert I*, would raise questions in reasonable minds about its ability to function impartially in this litigation. The manner in which the court recounted developments in *Lambert I* in that memorandum, saying, for example, that "with the Commonwealth of Pennsylvania's agreement that 'relief is warranted'," slip op. at 1; and "[o]ver the dissent of Judge Roth, which was joined in by three other Court of Appeals judges, the Court of Appeals on January 26, 1998 denied Ms. Lambert's petition for rehearing *en banc*," (App. 97-98), can be seen to give the strong impression that the court is operating with a firmly-entrenched view of the facts and claims since the court has chosen to focus on things--such as dissents by members of this Court[29]--which accord with its assessment and to

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overcome procedural default. *See* Addendum (Mem. of Nov. 21, 2001 at pp. 29-30 n. 22). While we recognize that the legitimacy of the district court's ruling on this point, and various others it addressed in its memorandum of November 21, 2001, are issues which must be left for another day, nevertheless we submit that the highly unusual manner in which the district court has proceeded would serve to cause reasonable persons to question whether the district court was, or ever could, be impartial.

[29]The district court not only mentioned the dissent relative to rehearing of the appeal which followed its ruling on the merits of this case, but also the dissent expressed relative to the Court's *en banc* decision denying Lambert bail pending action on her petition for certiorari. *See* (App.103) (referring to "the release we ordered on April 16, 1997, confirmed on April 21, 1997, and that five members of the Court of Appeals were prepared to give her on August 3, 1998"). In fact, there were only three dissenting votes on the ruling denying bail. *See* Opinion filed at Nos. 97-1281, 97-1283

ignore other, more important things which don't, *e.g.*, the fact that *twice* as many members of the Court did *not* vote for rehearing in the appeal which had vacated its ruling. *See* 134 F.3d at 525 (listing the members of the Court who had participated relative to the request for rehearing).

There is also the fact that misconduct charges had been filed against the district court with this Court by one of the individuals whose testimony figures centrally in this case--Hazel Show. *See* (App. 156-167)(where a decision by this Court relative to the complaint which was docketed at J.C. No. 99-50 (3d Cir. Feb. 22, 2000) appears). In mentioning this we do not mean to suggest that simply because someone associated with a case files a complaint against a presiding judge, it automatically follows that reasonable persons would question the judge's impartiality. But in this instance, observations by the Court in its decision lends additional support for the notion that reasonable persons would question the legitimacy of the district court's court's continued involvement. For although the Court ultimately dismissed this complaint, it nevertheless observed that, in some places, language used by the district court in its opinion in *Lambert I* was "hyperbolic and overly dramatic, as well as intemperate." *Id.,* slip op. at 4. Those remarks, which obviously recognize that the district court was possessed of extremely strong views on certain issues, indicate that, at times, the district court's opinion exceeded what was called for. Such an assessment by one trained in the law and therefore mindful of the fact that judicial opinion-writing is to be afforded a great deal of expressive latitude is of no small consequence. Rather, it serves to show how much easier it would be for a reasonable citizen, not possessed of the brakes acquired in the course of legal

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& 97-1287(3d Cir., Aug. 3, 1998)(*en banc*)(Stapleton, Roth and McKee, JJ., dissenting). This number constituted less than one-third of the ten judge *en banc* court, which decided the issue. The district court's opinion also indicates that the matter was considered *en banc* by the this Court *sua sponte*. Rather, as the record shows, respondents applied for *en banc* review with the Court on May 8, 1998.

training, to see in what the district court has said in its decision in *Lambert I* unshakable opinions about the issues, witnesses and evidence and, as a result, to have little or no confidence in its ability to be impartial in this case.

Moreover, the swiftness with which the district court has repeatedly acted with regard to matters initiated by Lambert in the wake of this Court's reversal of its ruling, particularly her application for bail, could not help but cause a reasonable person to wonder if the district court isn't "chomping at the bit" to assist her, and to reinstate its prior ruling granting her relief. So would the court's actions relative to the recusal motion filed in *Lambert I*, *i.e.*, ruling in a case that was clearly over--a case in which recusal had become a moot point.

But if that was not enough, the complete deviation from any semblance of normal procedure which has pervaded *Lambert II* to date would certainly serve to fuel questions about the district court's impartiality. Instead of treating this case as new action--Lambert's first *habeas* action--as it was required to do, *see Jones*, *supra*, and n. 26, *supra*, the district court has proceeded as though this is merely a continuation of her prior case. As its order of November 21, 2001, shows, it has chosen to by-pass the customary procedural niceties not requiring her to submit a suitable pleading and apparently intending to never allow the Commonwealth to submit a formal response to the petition.[30] A reasonable person, aware of all that has occurred, might believe that the Court cares too much about Lambert's claims and that, as this Court put it in *Primerica*, 10 F.3d at 164, the district court "has apparently not receded in his view" of the proper disposition of them. In short, this is one of the rare cases in which developments arising in the course of litigation warrant

[30]The next step the district court has ordained is for the parties are now to advise it by December 20, 2001, whether, in their respective views, any additional evidence is required. *See* Addendum (Order of Nov. 21, 2001 at ¶ 3).

recusal;[31] reasonable persons could believe from all that has gone before that the district court is possessed of a "deep-seated and unequivocal antagonism [concerning the Commonwealth's case] that would render fair judgment impossible." *Litkey*, 510 U.S. at 556.

[31] *Primerica* involved judicial disqualification stemming from case-based developments.

CONCLUSION

WHEREFORE, the Court should issue a writ of mandamus requiring the district court to recuse itself in this No. 01-2511 (E.D. Pa.).

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: CHARLOTTE BLACKWELL, AND D. MICHAEL FISHER,	:	
Petitioners	:	
	:	
v.	:	**No.**
	:	
LISA MICHELLE LAMBERT,	:	
Respondent	:	
	:	
THE HONORABLE STEWART DALZELL,	:	
Nominal Respondent	:	

CERTIFICATE OF SERVICE

AND NOW, this **27th** day of **November, 2001**, I, **AMY ZAPP, Senior Deputy Attorney General**, counsel for petitioners in the above-captioned matter, hereby certify that I served the foregoing **Petition for Writ of Mandamus** by causing a copy of the same to be placed in the United States mail, first class postage prepaid at Harrisburg, Pennsylvania addressed as follows:

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